

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

[illegible]

Docket Nos. 1,064,945
& 1,067,010

ORDER

Claimant appealed the November 14, 2014, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on March 20, 2015.

APPEARANCES

James S. Oswalt of Hutchinson, Kansas, appeared for claimant. Sylvia B. Penner of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The ALJ's Award indicated that in Docket No. 1,067,010, the parties stipulated claimant met with personal injury by accident on September 1, 2012. The ALJ's Award also indicated that in Docket No. 1,064,945, the parties stipulated claimant met with personal injury by repetitive trauma on February 11, 2013. At oral argument, the parties agreed the foregoing stipulations were not made and the Award was in error. The parties, at oral argument, stipulated that claimant's alleged date of injury by repetitive trauma in Docket No. 1,064,945 was October 2, 2012, the date a physician first informed claimant his injury was work related.

ISSUES

ALJ Klein found claimant did not provide timely notice of his injuries and, therefore, denied compensation. The ALJ stated:

Further, the Court is highly skeptical of the Claimant's testimony during the second discovery deposition at which time he introduces new accidents, conversations and theories that were clearly relevant at the time of his first deposition. Simply put the Court does not believe that the Claimant gave anything like timely notice of any injury and that finding is dispositive of both cases[.]¹

The ALJ did not address any other issues.

Claimant contends he gave timely notice in both claims. He asserts that in Docket No. 1,067,010, that sometime in July, August, September or October 2012, he sustained a work-related right foot injury when he stepped in a pothole. He continued working and aggravated the right foot injury. That gave rise to the injury by repetitive trauma alleged in Docket No. 1,064,945.

Respondent asserts claimant did not provide timely notice of his alleged injuries and, therefore, is not entitled to workers compensation benefits. Respondent requests the Board affirm the Award.

Claimant filed his Application for Hearing in Docket No. 1,067,010 after he filed his Application for Hearing in Docket No. 1,064,945. Because claimant alleges his date of accident in Docket No. 1,067,010 occurred earlier than his date of injury in Docket No. 1,064,945, the Board will first address Docket No. 1,067,010 in this Order.

The issues in Docket No. 1,067,010 are:

1. What is claimant's date of accident?
2. Did claimant provide timely notice of his injury by accident?

The issue in Docket No. 1,064,945 is: did claimant provide timely notice of his injury by repetitive trauma?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant's July 18, 2013, deposition testimony

Prior to his July 18, 2013, deposition, claimant filed his Application for Hearing in Docket No. 1,064,945, but not in Docket No. 1,067,010. Claimant testified that

¹ ALJ Award at 4.

commencing in August, September or October 2012, he began having pain in the bottom of his right heel. He recalled the pain progressed slowly. He bought two pairs of new shoes with inserts, but the inserts were uncomfortable and did not relieve the pain. When asked to what work-related event he attributed his foot injuries, he testified, "The way it was explained to me is the -- standing on the hard surface daily."²

Claimant testified he first sought treatment for his foot on October 2, 2012, at the Hutchinson Clinic, where claimant saw a physician assistant and Kirsten Paulsrud, D.P.M. Prior to seeing Dr. Paulsrud, claimant told his supervisor, Bob Roberts, his foot was so painful he was going to seek medical treatment. When asked if he told Mr. Roberts his foot condition was work related, claimant testified, "I couldn't -- I can't recall. I"³ Claimant also testified:

Q. Let me just follow up with a couple quick questions. Just so I'm clear, Mr. Chansler, when you -- when you were first meeting with Dr. Paulsrud, I gathered from what Jim [claimant's attorney] said you described to her what you did and --

A. Correct.

Q. -- at that time did she [Dr. Paulsrud] tell you that, gee, I think your work activities are making this worse? Is that why she took you off work?

A. I'm assuming that's the reason. There's no other explanation.⁴

On August 22, 2013, claimant completed a correction sheet for his July 18, 2013, deposition indicating he was correcting page 41 of his deposition testimony. Claimant wrote: "Attorney cut off my answer[.] I did provide Bob Roberts a note from my doctor saying I was not to walk on concrete which caused problems in my feet."⁵

Claimant indicated he did not turn Dr. Paulsrud's treatment in as a workers compensation claim and took care of it through his health insurance. In late October or early November 2012, claimant went on short-term disability for a few months. Claimant indicated that on November 2, 2012, he was told by Dr. Paulsrud not to work, stay off hard surfaces and avoid standing and walking excessively. At that time, claimant did not discuss a work-related claim with Mr. Roberts.

² Claimant Depo. (July 18, 2013) at 30.

³ *Id.* at 41.

⁴ *Id.* at 63-64.

⁵ *Id.*, Correction Sheet.

Deposition testimony of Dr. George G. Fluter

At the request of his counsel, claimant was evaluated by Dr. Fluter on July 17, 2013. Claimant reported he sustained a work-related injury around August/September 2012 when he stepped into a pothole and twisted his right ankle. According to Dr. Fluter, claimant reported the injury verbally to his employer, but continued working. Claimant reported to Dr. Fluter that he experienced right heel pain that increased over time, he had difficulty walking and he developed similar symptoms affecting the left heel within about one month of the onset of right heel symptoms. Claimant reported pain affecting his upper back, middle back, low back and both elbows, forearms, hips, knees and heels. Dr. Fluter's assessments were right foot/ankle injury, right foot plantar fasciitis, bilateral Achilles tendinitis and probable left foot plantar fasciitis. Dr. Fluter opined the prevailing factor for claimant's injury, need for medical treatment and resulting impairment was his work-related activities including stepping in the pothole. The doctor reasoned that stepping into the pothole led to the development of right-sided plantar fasciitis and Achilles tendinitis and the altered gait mechanics led to similar conditions affecting the left side.

Claimant's October 15, 2013, deposition testimony

Less than a month before this deposition, on September 23, 2013, claimant filed his Application for Hearing in Docket No. 1,067,010. Claimant testified he was carrying a door shell to the scrap iron bin, located at the north end of respondent's asphalt parking lot. Because of carrying the door in front of him, he could not see directly down to his feet. He stepped into a pothole. Claimant could not remember falling flat or prone on the ground, but indicated he fell onto a knee and experienced severe right ankle pain. He then carried the door shell another 50 feet to the scrap bin. Claimant indicated he had no lacerations, abrasions or physical deformity. On a pain scale of one to ten, his pain was a ten. Claimant thought the accident occurred in August, September or October 2012. He did not recall the day of the week the accident occurred or the time the accident occurred, other than the afternoon.

Claimant testified he immediately went inside and told Mr. Roberts about stepping in the pothole. Claimant indicated he expressed concern not only for himself, but also for any customers who might be walking through the parking lot. Claimant did not recall if Mr. Roberts inquired if he was hurt, but was sure he expressed he was hurt. Claimant did not ask for medical treatment from Mr. Roberts, nor did claimant obtain medical treatment. He may have taken ibuprofen or Tylenol. Claimant testified that, out of concern for his well-being, he should have been sent by Mr. Roberts to get checked out by a medical provider. Claimant did not ask Mr. Roberts to fill out an accident report because claimant did not feel it was his responsibility. Claimant testified:

Q. At any point did you follow up with Bob Roberts about the condition of your ankle?

A. I can't recall for sure.

Q. Now, at some point you talked to Bob Roberts about having foot pain?

A. Yes.

Q. And when in conjunction with twisting your ankle did you report having foot pain?

A. That would have been in the following month or two.

Q. When you talked to Bob Roberts about having foot pain, did you tell him it was related to twisting your ankle?

A. I, I can't be -- no. I can't say yes or no to that. I don't remember.⁶

Hutchinson Clinic records

The parties stipulated into evidence medical records from the Hutchinson Clinic. Those records include notes from a visit with physician assistant Kimberley Morgan and several visits with Dr. Paulsrud.

On October 2, 2012, claimant presented to Ms. Morgan with a complaint of off and on right heel pain for the last six months that worsened in the last two weeks. Claimant told Ms. Morgan he was an auto mechanic and was on his feet most of the day. When asked about prior injuries, claimant related twisting his ankle slightly in a pothole in the parking lot at work carrying a heavy part. Claimant indicated that was approximately two weeks before his right heel pain began.

Claimant was referred to Dr. Paulsrud and saw her the same day. Claimant denied any injury to his right foot. After physically examining claimant, the doctor's impressions were right foot plantar fasciitis, pain in limb and difficulty with ambulation. Dr. Paulsrud wrote: "I stated if he does not improve, he may have to undergo time off of work, stating that this is an overuse injury and that his heel needs rest."⁷ However, her notes do not contain any work restrictions. Dr. Paulsrud provided claimant a release to return to work that mentioned no work restrictions, but she authorized an absence from work for claimant from October 2 to 4, 2012.

Claimant again saw Dr. Paulsrud on October 16, 2012. Dr. Paulsrud's notes indicated that if claimant did not improve, he may have to take time off work because he

⁶ Claimant Depo. (Oct. 15, 2013) at 10-11.

⁷ Stipulated medical records of Hutchinson Clinic.

stands on concrete all day. The doctor's notes do not contain any work restrictions. On November 2, 2012, Dr. Paulsrud indicated she was taking claimant off work to allow his plantar fascia to heal and completed a work status report indicating claimant could not work until January 1, 2013. On February 1, 2013, Dr. Paulsrud allowed claimant to return to work on February 4, 2013.

Claimant's regular hearing testimony

Claimant worked for respondent from May 2009 through February 11, 2013. His job was an auto body technician. Claimant testified he stepped in a pothole at work in the time frame of July, August or September 2012. He was carrying a door shell to the scrap metal bin located in the parking lot. Claimant described his accident as follows:

I was carrying the door shell in front of me, because it was heavy, I believe it was off of a pickup, and was walking to the dumpster and stepped in a pothole and twisted my [right] ankle and fell, not completely flat.⁸

Claimant continued to the scrap metal bin to put in the door shell. Claimant indicated he then walked into the body shop and expressed his displeasure with the condition of the parking lot to Mr. Roberts, told him he had twisted his ankle and it hurt intensely. Claimant testified there were other employees present who heard the conversation. Claimant agreed that at no point did he tell anyone at respondent that he wanted to make a workers compensation claim.

Claimant indicated the same day he stepped in the pothole, he expressed his concern to Eldon Estes, the acting general manager of the facility at that time. Claimant told Mr. Estes his concern about the condition of the parking lot, told him what had happened, that he had tripped, fallen in the pothole carrying a part and twisted his ankle. Claimant testified he did not request any medical treatment at the time of the injury and never requested permission to go to a doctor as a result of the injury.

Claimant testified respondent never asked him to go to a doctor for his right ankle injury. He also testified he did not ask, nor was he asked, to fill out an accident report at the time of the right ankle injury.

Approximately 30 to 60 days after the pothole incident, claimant started having right heel pain, which he described as a sharp pain on the bottom of his right heel. As a result of the heel pain, claimant sought medical treatment at the Hutchinson Clinic, which referred claimant to Dr. Paulsrud. Claimant indicated that at his first visit with Dr. Paulsrud, the doctor injected his right heel to help alleviate the pain. The doctor also provided claimant with a night splint and gave him some instructions, including stretching and icing. Claimant

⁸ R.H. Trans. at 20.

was uncertain what caused his right heel pain, but believed it was a repetitive hard surface injury. Claimant indicated Dr. Paulsrud discussed with claimant walking on hard surfaces at the time of his visit with her.

Claimant testified that as a result of the October 2, 2012, visit with Dr. Paulsrud, he spoke with Mr. Roberts about his condition the same day. Claimant did not recall exactly what he told Mr. Roberts, but testified it would have been about possible time off in the future for the repetitive injury. Claimant believes he mentioned to Mr. Roberts the hard surface was a potential problem as to why he had a repetitive injury. Claimant indicated he had no work restrictions at that time. He did not ask, nor was he asked, to complete a workers compensation accident or incident report.

Claimant continued working, but his medical condition worsened. Claimant testified he developed knee and left foot pain, which he assumed was from favoring the right foot. He indicated that on or about November 2, 2012, Dr. Paulsrud gave him time off work to rest his foot. Claimant gave respondent a copy of the note from Dr. Paulsrud taking him off work. Claimant indicated that as a result of the note, respondent took him off work and he was not asked to fill out an accident or incident report. When he saw physician assistant Kimberley Morgan and was treated by Dr. Paulsrud, it was through his personal health insurance, not workers compensation insurance. Claimant testified he did not ask to complete a workers compensation claim form because he was not aware that he needed to do so.

Claimant indicated he was permitted to return to work around February 1, 2013. While off work, he received FMLA leave and short-term disability benefits. His last day was February 11, 2013. Claimant testified he was terminated for insubordination and talking on his cell phone too much. Claimant has not worked since his termination from respondent. He is still looking for work. Since his termination, claimant's right and left foot conditions have remained about the same. He continued to treat with Dr. Paulsrud for a period of time. Claimant has also seen Dr. Azad in Hutchinson twice regarding his foot conditions.

Deposition testimony of Robert "Bob" Roberts

Mr. Roberts testified he is the body shop manager for respondent at Midwest Ford in Hutchinson and was claimant's supervisor when he worked for respondent. If a worker under Mr. Roberts' supervision is injured at work, the worker is to report the injury to Mr. Roberts. If the injured worker needs medical attention, Mr. Roberts and the injured worker complete a report.

When asked if he recalled claimant telling him he stepped into a pothole in August, September or October 2012, he replied, "If he said something to me, I don't recall."⁹ Mr. Roberts indicated that if claimant had reported an injury from stepping in a pothole while carrying parts in August, September or October 2012, and needed medical attention, he would have completed a report. Mr. Roberts testified the east parking lot had potholes that he filled. However, he could not remember when he filled the potholes.

Mr. Roberts indicated he observed claimant limping the day before he sought medical treatment for his foot. Mr. Roberts testified:

Q. Mr. Chansler has also alleged that he has plantar fasci[i]tis to his heels or his feet as a result of working on hard surfaces. And do you recall him ever coming to you and complaining to you about that?

A. Yeah, the -- I think maybe a day before he went to the doctor he said his foot hurt.¹⁰

Mr. Roberts did not recall the date of the complaint or about which foot the complaint was made. Mr. Roberts indicated claimant made the complaint about a month before claimant's November 2, 2012, work status note from Dr. Paulsrud.

After going to the doctor, Mr. Roberts and claimant discussed claimant's doctor's appointment. Mr. Roberts testified claimant brought him a work status note dated November 2, 2012, from Dr. Paulsrud. Mr. Roberts honored the restriction that claimant should not work. On cross-examination, Mr. Roberts indicated that when he was told by claimant that he had foot problems, claimant never indicated the foot problems were because of a work injury.

According to Mr. Roberts, claimant was terminated in part for being on his cell phone at work for more than one and one-half hours the day he was terminated. Mr. Roberts indicated that prior to that, there had been issues involving claimant with attendance and cell phone usage.

Deposition testimony of Eldon Estes

Mr. Estes is the general manager for respondent at Midwest Ford. He testified claimant told him he stepped in a pothole and almost fell down. According to Mr. Estes, claimant did not report carrying something when he stepped in the pothole. Mr. Estes testified claimant never reported an injury to him. Mr. Estes indicated the conversation about the pothole possibly took place in July, August or September 2012.

⁹ Roberts Depo. at 16.

¹⁰ *Id.* at 18-19.

Deposition testimony of Rex Bainum

Mr. Bainum is the human resources manager at Midwest Ford. He testified respondent has put up posters spelling out the workers compensation rights of employees. He also indicated the employment manual has a policy on how to report work injuries. Mr. Bainum indicated he did not learn of a workers compensation claim asserted by claimant in the summer or fall of 2012. Mr. Bainum testified no work injury was reported to him by claimant.

Mr. Bainum testified that the day before claimant went to see his doctor, claimant came to his office and complained of having plantar fasciitis, unbearable pain and needed to see a doctor. At some point, claimant brought Mr. Bainum the work status note from Dr. Paulsrud taking him off work. Mr. Bainum referred claimant to the human resources manager in respondent's Wichita office and claimant filled out a form requesting short-term disability benefits.

A copy of claimant's short-term disability claim packet was placed into evidence. Part of the packet includes an employee's statement signed by claimant. The employee's statement asks for the applicant to select the appropriate type of condition and provide details. Claimant left blank the section asking if he sustained a work-related injury. Dr. Paulsrud completed the attending physician's statement and answered "no" to the question, "Is condition due to injury/sickness arising out of patient's employment?"¹¹

Deposition testimony of Dr. John F. McMaster

At respondent's request, claimant was evaluated by Dr. McMaster on February 26, 2014. Dr. McMaster's report indicated claimant stepped in a pothole, twisted his ankle, but did not fall. Claimant then reported the incident to Mr. Roberts. Dr. McMaster did not testify concerning whether claimant provided notice of his injuries to respondent. Dr. McMaster's testimony was not germane to the issue of notice and will not be discussed here.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue

¹¹ Bainum Depo., Ex. 1.

¹² K.S.A. 2012 Supp. 44-501b(c).

is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”¹³

K.S.A. 2012 Supp. 44-508, in part, states:

(d) “Accident” means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. “Accident” shall in no case be construed to include repetitive trauma in any form.

(e) “Repetitive trauma” refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. “Repetitive trauma” shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2012 Supp. 44-520(a) states:

- (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

¹³ K.S.A. 2012 Supp. 44-508(h).

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

. . .

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

Docket No. 1,067,010

Claimant never identified a specific date of accident. Instead, claimant testified he was injured sometime in July, August, September or October 2012. He could not identify the day of the week or the time of day he allegedly stepped in a pothole. Claimant maintains it is not necessary for him to establish a specific date of accident, because the same day he stepped in the pothole, he provided notice to Mr. Roberts and Mr. Estes. The Board does not concur with claimant's legal theory.

The burden of proof is on claimant to prove the conditions upon which his right to compensation depends. K.S.A. 2012 Supp. 44-508(d), in part, provides that "[a]n accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift." Claimant could not identify the time or date of his accident. Thus, claimant failed to meet his burden of proving his date of accident.

Even if claimant's theory that it is unnecessary for him to prove a specific date of accident is sound, the Board finds claimant failed to provide timely notice of his injury by accident. Mr. Estes testified claimant reported stepping into a pothole, but did not report an injury. K.S.A. 2012 Supp. 44-520(a) requires an injured worker to provide timely notice of his or her injury by accident. Claimant may have reported an accident to Mr. Estes, but did not report a work injury. Nor could Mr. Roberts recall claimant reporting the pothole incident and injuring himself.

Claimant's actions do not support his testimony. Claimant did not request medical treatment from his employer. He did not ask to file a workers compensation claim. He continued working and did not seek medical treatment until October 2, 2012, which claimant indicated was 30 to 60 days after stepping in the pothole. When claimant did seek medical treatment, he paid for it through his health insurance. Claimant applied for FMLA leave and went on short-term disability, rather than requesting workers compensation benefits.

Docket No. 1,064,945

Claimant contends he provided timely notice of his injury by repetitive trauma. Claimant asserts he reported his right foot injury to Bob Roberts after seeing Dr. Paulsrud on October 2, 2012, and learning his injury was caused by repetitive walking on hard surfaces. The Board disagrees.

After being taken off work by Dr. Paulsrud on November 2, 2012, claimant filed a claim for short-term disability benefits. He did not indicate on the employee's statement that his right foot condition was work related. Dr. Paulsrud, on the attending physician's statement, indicated claimant's right foot condition was not work related.

The ALJ was highly skeptical of claimant's testimony. As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,¹⁴ appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. The Kansas Supreme Court has stated: "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."¹⁵

Here, the ALJ had the opportunity to assess claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant presented insufficient evidence to prove he gave timely notice of his injury. The Board concurs with the ALJ's assessment.

CONCLUSION

Claimant failed to provide timely notice of his alleged work accident in Docket No. 1,067,010 and his injury by repetitive trauma in Docket No. 1,064,945.

¹⁴ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

¹⁵ *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the November 14, 2014, Award entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of April, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge

¹⁶ K.S.A. 2013 Supp. 44-555c(j).